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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GABRIEL CAVAZOS, Defendant and Appellant.	A155355 (San Mateo County No. SC073539A)

Gabriel Jason Cavazos appeals from a judgment rendered on August 15, 2018, in which he was sentenced to an aggregate prison term of ten years and eight months. Cavazos alleges that the sentencing court failed to perform its statutory duty to obtain an up-to-date probation report before deciding his sentence, that he was denied effective assistance of counsel at sentencing, and that the trial court misunderstood and failed to exercise its sentencing discretion. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Original Trial and Sentencing

A jury convicted Cavazos of sexual offenses committed against three teenaged girls. On September 25, 2009, Cavazos drove M.M. to his house, refused to let her leave, and molested her. On December 24, 2009, Cavazos raped E.P. in a bathroom at a house party. And sometime between November 29 and December 24, 2009, Cavazos trapped S.P. in his bedroom and molested her before she eventually escaped. A more

comprehensive discussion of the facts can be found in *People v. Cavazos* (Dec. 14, 2017, No. A143701) ___Cal.App.5th___ [2017 Cal. App. Unpub. LEXIS 8597].

Cavazos was charged with attempting to dissuade a witness (M.M.) in violation of Penal Code section 136.1, subdivision (b)(1)[1] (count one); misdemeanor sexual battery of M.M. in violation of section 243.4, subdivision (e)(1) (count two); misdemeanor false imprisonment of M.M. in violation of section 236 (count three); rape of E.P. in violation of section 261, subdivision (a)(2) (count four); felony false imprisonment of E.P. in violation of section 236 (count five); communicating with a minor (S.P.) to commit a specified sex act in violation of section 288.3, subdivision (a) (count six); lewd and lascivious act on a child age 14 or 15 (S.P.) in violation of section 288, subdivision (c)(1) (count seven); misdemeanor false imprisonment of S.P. in violation of section 236 (count eight); and a ninth count not relevant here. The information also alleged Cavazos had served two prior prison terms within the meaning of section 667.5, subdivision (b).

The trial court dismissed counts one and nine pursuant to section 1118.1, and the jury found Cavazos guilty on all remaining counts. The trial court then found the alleged prison priors to be true, and sentenced Cavazos to a total of 11 years in state prison followed by two years and six months in county jail. Cavazos appealed, and this court reversed Cavazos's conviction on count three but otherwise affirmed, vacating the judgement and remanding the matter to the trial court for resentencing.

II. Re-Sentencing

The same judge who had presided over Cavazos's trial resentenced Cavazos on July 30, 2018. At the resentencing hearing the parties did not request, and the court did not order, a supplemental probation report. Cavazos told the court about the college courses he had taken in prison and the good grades he had received, and how the experience had humbled him and made him realize how manipulative he had been toward

[1] All further statutory references are to the Penal Code.

his victims. The court denied Cavazos's motion for probation on the grounds that he had previously not complied with probation and parole conditions.

Regarding count four, the principal count, the court observed the vulnerability of the victim as well as the viciousness and callousness of Cavazos and, finding that the circumstances in aggravation outweighed the circumstances in mitigation, sentenced Cavazos to the upper term of eight years in state prison. The court sentenced Cavazos to eight consecutive months in prison for count seven, and six concurrent months in county jail for count two. The sentence for count five was two years in prison, for count six it was one year in prison, and for count eight it was one year in county jail, but all three of these sentences were stayed pursuant to section 654. The court also imposed two additional years pursuant to section 667.5, subdivision (b), for Cavazos's prison priors, for a total sentence of ten years and eight months. In addition, Cavazos was required to submit a DNA sample pursuant to section 296, to be tested for HIV/AIDS pursuant to section 1202.1, to register as a sex offender pursuant to section 290, to cease all contact with the victims, and to pay restitution. Cavazos timely appealed on August 15, 2018.

DISCUSSION

Cavazos makes three main arguments on appeal: (1) the court erred in failing to perform its statutory duty to obtain an up-to-date probation report; (2) Cavazos was denied the effective assistance of counsel when his attorney failed to request a supplemental probation report, to file a sentencing memorandum or direct the court's attention to prior counsel's memorandum, and to present other extenuating and mitigating evidence; and (3) the trial court misunderstood and failed to exercise its sentencing discretion. We will address these arguments in turn.

I. The Court Was Not Required to Obtain a Supplemental Probation Report

Cavazos argues that the trial court erred in failing to obtain a supplemental probation report before resentencing him. California Rules of Court, rule 4.411 states, "the court must refer the case to the probation officer for: (1) A presentence investigation

and report if the defendant: (A) Is statutorily eligible for probation or a term of imprisonment in county jail under section 1170(h); or (B) Is not eligible for probation but a report is needed to assist the court with other sentencing issues, including the determination of the proper amount of restitution fine; (2) A supplemental report if a significant period of time has passed since the original report was prepared." Cavazos relies on part (2) of this rule, mistakenly assuming that it requires a supplemental report even in circumstances where part (1) does not require an initial report.

Where a defendant is not statutorily eligible for probation, rule 4.411 does not require a probation report. Section 1203, subdivision (g) states, in part, that when a person is not eligible for probation "[t]he judge, *in his or her discretion*, may direct the probation officer to investigate all facts relevant to the sentencing of the person" (emphasis added). When a "defendant did not request a supplemental probation report or object to proceeding without one [and] [w]here, as here, a defendant is ineligible for probation, such omissions result in waiver of a supplemental report in the trial court and forfeiture of the right to object to the absence of such a report on appeal." (*People v. Franco* (2014) 232 Cal.App.4th 831, 834; see also *People v. Llamas* (1998) 67 Cal.App.4th 35, 38-39 (*Llamas*).)

Here, the trial court denied Cavazos's motion for probation on the grounds that he had previously not complied with probation and parole conditions. Additionally, Cavazos admits that he is not eligible for probation on count four, the rape charge. Because Cavazos did not request a supplemental probation report at the time of his resentencing, and did not object to proceeding without one, he has forfeited his right to object to this matter on appeal. Cavazos's contrary argument relies on a series of cases beginning with *People v. Brady* (1984) 162 Cal.App.3d 1, where the court stated that, "even when the defendant is ineligible for probation, if the resentencing court has discretion to alter the length of the defendant's imprisonment, it must obtain a new, updated probation report, including information regarding the defendant's behavior while

incarcerated during the pendency of any appeal, before proceeding with the resentencing." (*Id*. at p. 7.)

Cavazos's reliance on *Brady* is misplaced because that decision was abrogated by the very same court ten years later, in *People v. Bullock* (1994) 26 Cal.App.4th 985, and has been consistently departed from by other courts since then. (See, e.g., *Llamas, supra*, 67 Cal.App.4th 35, *People v. Johnson* (1999) 70 Cal.App.4th 1429 (*Johnson*), and *People v. Dobbins* (2005) 127 Cal.App.4th 176 (*Dobbins*).) In *Bullock*, the defendant relied on *Brady* in arguing that the preparation of a supplemental probation report was required even though he was ineligible for probation. (*Bullock* at p. 987.) In response to this argument, the court said that the language of *Brady* could not be squared with the language of section 1203, subdivision (g), "which expressly gives the trial court discretion to refer the matter to the probation officer for investigation and report on facts relevant to sentencing when the defendant is ineligible for probation. Because we conclude *Brady* incorrectly strips the trial court of discretion, we will no longer follow it." (*Bullock* at p. 987, fn. omitted.)

The other cases that Cavazos cites to, including *People v. Tatlis* (1991) 230 Cal.App.3d 1266, *People v. Smith* (1985) 166 Cal.App.3d 1003, *People v. Foley* (1985) 170 Cal.App.3d 1039, *People v. Warren* (1986) 179 Cal.App3d 676, *People v. Jackson* (1987) 189 Cal.App.3d 113, *People v. Leffel* (1987) 196 Cal.App.3d 1310, and *People v. Flores* (1988) 198 Cal.App.3d 1156, all follow *Brady* but predate *Bullock*. Because we find *Bullock* the better reasoned case, we decline to follow Cavazos's older case law. We agree with *Bullock* and the subsequent cases that hold the decision to order a supplemental report for a probation-ineligible defendant is soundly within the trial court's discretion.

Cavazos also cites *Dobbins*, where the court held that a supplemental probation report could not be waived at resentencing unless the parties formally stipulated to the waiver, or otherwise met the formality requirements of section 1203, subdivision (b)(4).

(*Dobbins, supra,* 127 Cal.App.4th at p. 182.) However, this procedural requirement only applies to defendants who are eligible for probation. (*Ibid.*; *Johnson, supra,* 70 Cal.App.4th at p. 1432.) Here, Cavazos is not probation-eligible, so *Dobbins* does not apply. The trial court properly exercised its discretion, and was not required to obtain a supplemental probation report.

II. Cavazos Was Not Denied Effective Assistance of Counsel

Cavazos claims that he was denied effective assistance of counsel because his trial attorney failed to request a supplemental probation report, to file a sentencing memorandum, or to direct the court's attention to the memorandum filed by his prior attorney, and failed to present other mitigating evidence for the purpose of sentencing. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Strickland v. Washington* (1984) 466 U.S. 668, 686 (*Strickland*).)

Cavazos must show two things to prove ineffective assistance of counsel: "First, [he] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, [he] must show that the deficient performance prejudiced the defense." (*Strickland, supra,* 466 U.S. 668 at p. 687.) To establish prejudice, Cavazos "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.* at p. 694.) "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." (*Id.* at p. 691.)

With regard to the supplemental probation report, Cavazos argues that any competent attorney would have requested a current report, unless there was reason to believe that the report would be unfavorable. He argues that his attorney had no reason

to believe the supplemental probation report would be unfavorable. But even if not requesting the report was error on Cavazos's attorney's part, there is no showing here that this error led to prejudice, i.e. that having a supplemental probation report would have led to a more favorable sentence. Cavazos indicates that the report would have reflected the eight college courses he took, and the good grades he received in those courses, but Cavazos himself presented this information to the court during the sentencing hearing, and the judge was fully aware of it when choosing Cavazos's sentence. Other than the college courses, Cavazos fails to present any other mitigating factors that might have been included, or to point out any other reason to believe that a supplemental probation report would have increased the probability of a more favorable outcome for Cavazos.

This case is similar to *Llamas, supra*, 67 Cal.App.4th 35, in which Llamas claimed ineffective assistance of counsel because his attorney failed to obtain a supplemental probation report. (*Id.* at p. 38.) Llamas was similarly ineligible for probation. (*Id.* at p. 39.) At the sentencing hearing, the court was presented with statements about Llamas's educational achievements, as well as a showing of support from family and friends. (*Llamas,* at p. 38.) The trial court chose not to request a supplemental probation report, and the appellate court held that a report was not required because, "[n]othing would have been added to Llamas's efforts to persuade the court to dismiss his strike and make more lenient sentencing choices." (*Id.* at pp. 40–41.) This is the same position Cavazos finds himself in here. There was no showing that any new information not provided directly to the court would have been included in the supplemental probation report, so Cavazos's defense was not prejudiced by its absence.

Cavazos's next claim concerns his attorney's failure to file a sentencing memorandum, and to direct the court's attention to the memorandum filed by his prior attorney. On the first point, Cavazos again fails to "affirmatively prove prejudice" (*Strickland, supra,* 466 U.S. 668 at p. 693) with any examples of how a new sentencing memorandum would have resulted in a more favorable outcome. With regard to the

memorandum filed by his prior attorney, Cavazos points out that the memorandum recounts the prosecution's pre-trial offer to settle the case for a total sentence of seven years and eight months,[2] which was less than the sentence he ended up receiving.

Cavazos argues, citing *In re Lewallen* (1979) 23 Cal.3d 274 (*Lewallen*), that his attorney should have pointed out the memorandum to the court because the court should not, without good reason, have imposed a greater prison term than what had been offered before trial. We disagree. *Lewallen* states that the trial court is "precluded from imposing a more severe sentence because the accused elects to proceed to trial. Trial courts may not thus chill exercise of the constitutional right to trial by jury." (*Id.* at p. 281) In *Lewallen*, the prosecution had offered the defendant a negotiated sentence, which he refused. (*Id.* at p. 276.) After a jury conviction, the trial judge gave defendant a more punitive sentence than the one previously offered, commenting, "there's no reason in having the District Attorney attempt to negotiate matters if after the defendant refuses a negotiation he gets the same sentence as if he had accepted the negotiation. It is just a waste of everybody's time." (*Lewallen*, at pp. 276–277.) On appeal, the Supreme Court of California on the basis of these comments found that the sentencing decision was influenced by improper considerations regarding the defendant's refusal to accept a plea bargain. At the same time the Supreme Court emphasized that "a trial court's discretion in imposing sentence is in no way limited by the terms of any negotiated pleas or sentences offered the defendant by the prosecution." (*Id.* at p. 281.)

In Cavazos's case there is no indication that the trial judge's sentence was improperly influenced by Cavazos's refusal to enter into a plea deal. The sentencing colloquy shows that the judge did not impose a more severe sentence because Cavazos

[2] Cavazos has moved for augmentation of the record to include the sentencing memorandum (Docket entry of Jan. 15, 2019), and the People do not oppose this motion. We grant the motion.

chose to proceed to trial, but instead because of her own obligation to weigh the aggravating and mitigating factors and choose a legally appropriate sentence.

III. The Court Properly Exercised Its Sentencing Discretion

Cavazos argues that the trial court failed to understand the scope of discretion it had during sentencing and consequently failed to exercise informed discretion, which constitutes an abuse of discretion. "[W]hen part of a sentence is stricken on review, on remand for resentencing 'a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances.' " (*People v. Buycks* (2018) 5 Cal.5th 857, 893, citing *People v. Navarro* (2007) 40 Cal.4th 668, 681.) Overall, the trial court is allowed broad discretion in its sentencing decisions, and "its sentencing decision will be subject to review for abuse of discretion." (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

Cavazos quotes the trial judge saying "I think I have to go back and look at what the status was at the time of the trial [in 2012] and determine what is the appropriate sentence," arguing that the court mistakenly refused to take into account any of the mitigating circumstances that had occurred since 2012. While this statement by the judge would be, in isolation, troubling, it is not the only indication of what she considered when choosing Cavazos's sentence. The judge also commented that she appreciated "the fact that if you're given opportunities to better yourself through education, clearly, the smart thing to do is to do that. And so I give Mr. Cavazos credit for not just sitting in prison, but actually doing something that is worthwhile." This shows that the trial judge did consider what had happened after 2012. Her statement about looking back to 2012 indicates the importance of focusing on the crimes of conviction in determining an appropriate sentence. As the trial judge stated, "while I am impressed by Mr. Cavazos's statement and his conduct, I am also mindful of the damage that was suffered by the victims in this case." Taking the record as a whole, it is clear that the judge listened to

the arguments from both parties, weighed all the evidence presented, and then exercised informed discretion in selecting the sentence.

DISPOSITION

The judgment is affirmed.

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TUCHER, J.

WE CONCUR:

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POLLAK, P. J.

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BROWN, J.

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